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NO.: 93-1100 (3)

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1993

STATE OF ALABAMA, PETITIONER,

V.

TIMOTHY JOHN YELDER, RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, **TIMOTHY JOHN YELDER**, asks leave to file his brief in opposition to the petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to so proceed in the lower court. Respondent's affidavit in support of this motion is attached hereto.

Timothy Yelder
TIMOTHY JOHN YELDER
Respondent

ADDRESS OF COUNSEL:
JOHNNY HARDWICK, ESQ.
449 South McDonough Street
Montgomery, AL 36104
(205) 265-0117

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document has been served upon the Hon. James H. Evans, Attorney General, and Hon. Margaret Scholten Childers, Assistant Attorney General, Counsel of Record for Petitioner, Office of the Attorney General, Criminal Appeals Division, Alabama State House, 11 South Union Street Montgomery, AL 36130, via United States Mail, first-class postage prepaid, on this the 27th day of January, 1994.

J. G. Hardwick
JOHNNY HARDWICK, Esq.

14pp

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

STATE OF ALABAMA, PETITIONER,

V.

TIMOTHY JOHN YELDER, RESPONDENT.

AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Timothy John Yelder, being first duly sworn, depose and say that I am the Respondent in the above-entitled case, that in support of my Motion for Leave to Proceed In Forma Pauperis, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ____ No ✓
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   _____

   _____

   b. If the answer is no, state the date of your last employment and amount of the salary or wages per month which you received.
   1988 was the last year I worked. I am presently serving a life sentence and I have been in prison since 1988.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?
   Yes ____ No ✓
   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

   _____

   _____

3. Do you own any cash or checking or savings account? Yes___ No ✓

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ____ No ✓

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Timothy Yelder
TIMOTHY JOHN YELDER
Respondent

Subscribed and sworn to before me this 27th day of January, 1994.

Jo Ly Hardwick
Notary

My Commission expires: 10/13/96

ADDRESS OF COUNSEL:
JOHNNY HARDWICK, ESQ.
449 South McDonough Street
Montgomery, AL 36104
(205) 265-0117

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document has been served upon the Hon. James H. Evans, Attorney General, and Hon. Margaret Scholten Childers, Assistant Attorney General, Counsel of Record for Petitioner, Office of the Attorney General, Criminal Appeals Division, Alabama State House, 11 South Union Street Montgomery, AL 36130, via United States Mail, first-class postage prepaid, on this the 27th day of January, 1994.

Jo Ly Hardwick
JOHNNY HARDWICK, Esq.

NO. 93-1109

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1993

STATE OF ALABAMA,

PETITIONER,

V.

TIMOTHY JOHN YELDER,

RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION
TO THE PETITION
FOR WRIT OF CERTIORARI

Of Counsel:

JOHNNY HARDWICK

449 South McDonough Street
Montgomery, AL 36104
(205) 265-0117

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PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

STATEMENT OF THE CASE

The Respondent accepts the Petitioner's Statement of the Case except the statements made on pure speculation as to the prosecutor's subjective reasons for asking certain questions on voir dire examination which was conducted by the trial Judge.

ARGUMENT

The judgment of the Alabama Supreme Court is not in conflict with this court's decisions in Batson v. Kentucky, 476 U. S. 79 (1986), and Hernandez v. New York, 111 S. Ct. 1854 (1991)

The Alabama Supreme Court in the instant case held "that the prosecution purposefully discriminated against the Respondent in the jury selection process through its use of peremptory challenges" .

The opinion of the Court is more succinct than anything Yelder might write, and therefore Yelder quotes the following reasoning for the holding of the Court.

> "In many respects, this case bears a remarkable resemblance to Ex parte Bird, 594 So. 2d 676 (Ala. 1991). First, the statistics are strikingly similar. In Bird, although "black veniremembers comprised 36% of the venire," the percentage of black jurors actually seated on the jury represented "only 8% of the trial jury." Id. at 680. The State, in that case, "used 85% of (its) peremptory challenges, that is, 17 of 20 strikes, to eliminate 89% of the black veniremembers." Id. at 681. In this case, the jury pool contained a total of 86 veniremembers of which only 27, that is, 31%, were black. The State then used 75% of its peremptory challenges -- 24 of 32 strikes -- to reduce that 31% by another 89%.[1]
>
> As we pointed out in Bird, the sheer weight of statistics such as these raises a strong inference of racial discrimination requiring clear and cogent explanations by the

[1]Ultimately, two black veniremembers were seated on the jury.

> State in rebuttal. Id. at 680-81. Instead of such explanations, however, those proffered in this case virtually parallel the whimsical, ad hoc excuses we rejected in Bird -- in particular, the State's explanations for its challenges of veniremember number 26 (same name as someone allegedly prosecuted by the district attorney's office), id. at 682-83; veniremember number 76 (excluded because of prosecutrix's "gut reaction"), id. at 684; veniremember number 96 (excluded because of "body language"), id. at 685; and veniremember number 33 (alleged "communication difficulty"). Id.
>
> Moreover, the "articulation" or "communication" difficulties cited by the State as reasons for its challenges of veniremember number 75 and number 132 are not supported by the record....
>
> Obviously, the State's allegations of communication deficiencies on the part of these veniremembers are not only wholly without support in the record, but
> are directly refuted by it. Perhaps most cogently, the record, which reveals a series of clear and unequivocal responses given by veniremember number 132, forcefully contradicts the prosecution's assertions that he "couldn't understand a word she said, "because of "the way she put her sentences together." We are compelled to conclude that the explanations advanced by the State for its challenges of those veniremembers represent no more than a pretext for racial discrimination.
>
> We regret that the conduct of the prosecution has, because of actions taken on the basis of race, once again necessitated a retrial, thus creating an additional strain on the judicial and economic resources of this state...."

The Alabama Supreme Court "did not commit clear error" in determining that the prosecutor violated Batson. The Alabama Supreme Court gave" appropriate weight to the disparate impact "of the prosecutor's conduct.

The Alabama Supreme Court chose not to believe the prosecutor's explanation of its assertion of race neutral reasons for its preemptory strikes, see Hernandez.

The Alabama Supreme Court took "a permissible view of the evidonce in [not] crediting the prosecutor's explanation (Hernandez v. New York, 111 S. Ct. 1859 (1991).

in the present case before this Honorable Court, the judgment of the Alabama Supreme Court finding that the Respondent's constitutional rights were violated by the State is not clearly erroneous.

To overruled the Alabama Supreme Court "would pervert the concept of federalism", Bose Corp v. Consumers Union of United States, Inc., 466 U. S. 485, 104 S. Ct. 1949, 80 L.Ed 2d 502 (1984) Hernandez v. New York, 111 S. Ct. 1859 (1991).

This court should "discern no clear error in the Alabama Supreme Court's determination that the prosecutor discriminated on the basis of race. As was stated in Hernandez, supra, "where there are two permissible views of the evidence, the choice between them cannot be clearly erroneous". Anderson v. Bessemer City, 470 U. S. 564, 574, 105, S. Ct. 1504, 1511, 88 (2d, 2d 518 (1985).

Respondent is a member of a cognizable racial group, Batson, 476 U. S. at 99, citing Castaneda v. Partida, 430 U. S. 482 (1977), and the prosecution exercised its peremptory challenges to remove from the venire nearly all members of Respondent's race. The prosecution used twenty-four (24) of its thirty-two (32) strikes to remove blacks from the venire. (Vol. I, TR-196) It is recognized that removing all or almost all blacks, or using all or almost all strikes against Blacks, may raise a prima facie case of discrimination. Additionally, the striking of a disproportionate number of blacks so as to render minority representation on the jury impotent may constitute a prima facie case of discrimination. Batson, supra.

Furthermore, this is a case involving a black man accused of raping several white women, which makes it susceptible to racial discrimination. These factors, coupled with

the notion that peremptory challenges constitute a jury selection practice which permit "those to discriminate who are of a mind to discriminate", Batson, 476 U. S. at 96 (quoting Avery v. Georgia, 345 U. S. 559, 562 (1953), created an inference that the striking of all but two of the black veniremen was on account of race.

Under these circumstances, Alabama's Supreme Court is to be commended for its decision.

CONCLUSION

The Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Timothy Yelder IV

TIMOTHY YELDER
RESPONDENT

JOHNNY HARDWICK, Esq.
ATTORNEY FOR DEFENDANT

ADDRESS OF COUNSEL:
449 SOUTH MCDONOUGH STREET
MONTGOMERY, AL 36104
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JOHNNY HARDWICK J D
ATTORNEY AT LAW

MARVIN W WIGGINS LL M
ATTORNEY AT LAW

TELEPHONE (205) 265 0117
FACSIMILE (205) 265 4780

February 7, 1994

Mr. Frank Lorson
Chief Deputy Clerk
Supreme Court of the
United States
#1 First Street, N. E.
Washington, D. C. 20543

RE: STATE OF ALABAMA VS. TIMOTHY YELDER
PETITION FOR CERTIORARI
NO.: 93-1109

Dear Mr. Lorson:

This letter is to respectfully request a thirty- (30) day extension of time to file a "Brief In Opposition to the Petition for Certioran" in the above-styled matter.

The extension of time is requested for the following reasons:

1. The Respondent, Timothy Yelder is currently incarcerated in a correctional facility in St. Clair, Alabama, which is approximately a 300 mile round-trip commute for Respondent's attorney;

2. I am assisting Mr. Yelder in preparing his response;

3. I have not been admitted to practice for the Supreme Court and am in the process of submitting my application;

4. There is no objection from the attorney for the Petitioner;

Please find the enclosed MOTION TO PROCEED IN FORMA PAUPERIS and THE AFFIDAVIT IN SUPPORT THEREOF on behalf of the Respondent. I will forward my application for admission to the Bar of the Supreme Court under separate cover.

Your immediate attention to this matter will be greatly appreciated.

Sincerely,

JOHNNY HARDWICK, Esq.

cc: Hon. Margaret S Chiders
Attorney for Petitioner

NO. 93-1109

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

STATE OF ALABAMA,

PETITIONER

VS.

TIMOTHY JOHN YELDER,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

CERTIFICATE OF SERVICE

I, Margaret Scholten Childers, a member of the Bar of the Supreme Court of the United States, do hereby certify that I served three copies of the Petition for a Writ of Certiorari and three copies of the Appendix to said petition on all parties required to be served, to-wit: the attorney for Respondent Timothy John Yelder, as follows:

Johnny Hardwick, Esq.
449 South McDonough Street
Montgomery, Alabama 36104

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SUPREME COURT, U.S.

on this 6th day of January, 1994, by depositing the same in the United States mail, properly addressed and first class postage prepaid. Mr. Hardwick's telephone number is (205) 265-0117.

Margaret Scholten Childers

MARGARET SCHOLTEN CHILDERS
ASSISTANT ATTORNEY GENERAL

ATTORNEY FOR THE PETITIONER

ADDRESS OF COUNSEL:

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